Not Unless Licensed

Court Holds Not Even Skilled or Proficient Persons, If Unlicensed, May Perform Acts That Are Medical or Surgical in Character

HOWARD HASSARD, *Legal Counsel*
California Medical Association

THE SUPREME COURT OF CALIFORNIA in a unanimous opinion filed in December 1961, held that a licensed physician and surgeon who permits an unlicensed M.D. to perform medical or surgical acts for him is guilty of unprofessional conduct. This opinion construes certain parts of the Business and Professions Code for the first time. It will have an important influence for years to come in all the licensed professions.

Jack R. Magit, M.D., the director and chief anesthesiologist of the Beverly Hills Doctors Hospital, employed three M.D.'s unlicensed in California to assist him in administering anesthetics, including spinal and epidural anesthetics, from March 1956 to July 1958.

The California Board of Medical Examiners formally charged Dr. Magit with violation of Section 2392 (employing or aiding and abetting an unlicensed person to practice any system or mode of treatment), Section 2378 (conspiring to violate any section), and Section 2141 (any unlicensed person who practices). The board found that Dr. Magit knowingly aided and abetted three unlicensed persons to administer anesthetics. The facts showed that these men had specialized training and experience in anesthesiology and were highly competent. Their work was done with his knowledge and authorization. Doctors Hospital is not approved for the training of students or interns. Dr. Magit acted in good faith and upon advice of counsel that such practice was not illegal. The board found Dr. Magit guilty of unprofessional conduct under Sections 2392, 2378, and 2141 of the Business and Professions Code, and revoked his license.

The California Supreme Court used this language in concluding that the administration of anesthetics is an integral part of surgical treatment:

"Our statutes do not specifically provide that one who administers anesthetics must have a license to practice medicine or any of the other healing arts. Whether the administration of anesthetics by the three unlicensed persons was illegal and made Dr. Magit guilty of unprofessional conduct depends primarily upon whether it constituted the practice of 'any system or mode of treating the sick or afflicted' within the meaning of Sections 2141 and 2392. If the administration of anesthetics does not come under these provisions, everyone would be free to administer them since there is no other statutory restriction which would apply. Those who administer anesthetics 'use drugs or what are known as medical preparations in or upon human beings' and, in administering spinal or epidural anesthetics, they 'penetrate the tissues of human beings' within the meaning of Section 2137 of the code, which includes the quoted terms in setting forth the practice authorized by a physician's and surgeon's certificate. The application of anesthetics is obviously an integral part of the surgical treatment which it facilitates, and it falls directly within the language of Sections 2141 and 2392."

The court then elaborated this point by referring to the legislative intent as shown in several sections of the various statutes and also cited several cases which buttressed this conclusion. Among other things the court said:

". . . The desirability of restricting the right to administer anesthetics was recognized in *Painless Parker vs. Board of Dental Examiners*, 216 Cal., where this court said: 'The right to administer anesthetics which produce local or general insensibility to pain or drugs which may produce total or semi-unconsciousness, or otherwise affect the nervous system, should be withheld not only from all persons who are not highly skilled in the knowledge of and the use of said drugs, but also from persons who cannot produce evidence of good moral character.' "

Some medical acts, the court went on to point out (including administration of anesthetics under some circumstances), may be done by persons not licensed to practice medicine in California. By statutory exception certain persons engaged in medical study and teaching at approved hospitals may perform acts which constitute treatment of the sick. Also in the case of *Chalmers-Francis vs. Nelson* (1936) 6 Cal. 2d, 402, it was held that a licensed registered nurse under the immediate direction and supervision of the operating surgeon would not in administering an anesthetic be practicing medicine. The Supreme Court said of the facts in that case and the applicable statute:

"At the time of the Chalmers-Francis case the statutes provided for the licensing of nurses but did not define or restrict their functions. In the absence of a statutory definition the court looked to the

existing custom and practice concerning the administration of anesthetics by nurses. It has generally been recognized that the functions of nurses and physicians overlap to some extent, and a licensed nurse, when acting under the direction and supervision of a licensed physician, is permitted to perform certain tasks which, without such direction and supervision, would constitute the illegal practice of medicine or surgery.

". . . Three years after the Chalmers-Francis decision, a number of provisions concerning nursing were added to the code, among which were Sections 2725 and 2726. Section 2725 defines the practice of nursing and shows a legislative intent that a nurse may, under the direction of a licensed physician, perform services which require technical skill and medical knowledge. Section 2726 states that the chapter dealing with nursing does not confer any authority to practice medicine or surgery. These sections must be construed together, and when this is done it is clear that Section 2726 does not mean that nurses are precluded from performing all acts which are medical or surgical in character but, rather, that they would be guilty of illegally practicing medicine or surgery only if their conduct in performing such acts did not come within the permissible scope of a nurse's functions as defined in Section 2725. The definition in Section 2725 is so broad that the administration of certain forms of anesthetics by a registered nurse acting under the immediate direction and supervision of a licensed physician, may come within its scope. To what extent and under what conditions it authorizes nurses to perform such acts is not before us, and we need note only that any authority they may have in this field is derived from their special statutory position and does not affect the authority of others. . . ."

The court thus concluded that in the absence of a statutory exception such as applies to nurses and those engaged in medical study and teaching "*one who is not licensed to practice medicine or surgery cannot legally perform acts which are medical or surgical in character,* and supervision does not relieve an unauthorized person from penal liability for the violation of the statutes. . . ." In order to assure the protection of the public, it is required "that a person's competency be determined by the State and evidenced by a license."

The fact that the acts were done under supervision is not controlling.

"Likewise a licensed practitioner who aids and abets the performance of medical or surgical acts by an unauthorized person is guilty of unprofessional conduct under Section 2392 of the code even though the acts are done under his immediate direction and supervision. . . .

"It follows from what we have said that Dr. Magit was guilty of unprofessional conduct in violation of Section 2392 since he aided and abetted the practicing of medicine by three unlicensed persons and that this conduct also violated Section 2141. The contrary conclusions reached by the trial court are erroneous, and the judgment must be reversed."

The court then considered whether or not the penalty imposed—revocation of license—was proper and concluded as follows:

"In a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion. In applying the rule in the present case, the following circumstances must be considered: The court on sufficient evidence found that Dr. Magit acted in the utmost good faith, that Rios, Celori and Ozbey were doctors of medicine with specialized training in anesthesiology and were highly competent anesthetists, and that on the basis of legal advice, Dr. Magit was justified in assuming that the authorizing of the three unlicensed men to administer anesthetics was legal. In considering whether persons such as Rios, Celori and Ozbey could legally administer anesthetics, Dr. Magit was confronted with a question not specifically answered by the code or by any decision of our courts, and the Chalmers-Francis case had held that, in addition to licensed physicians, licensed nurses could administer anesthetics.

"Under the circumstances of this case the imposition of the maximum penalty (revocation of Dr. Magit's license), which would prevent him from being gainfully occupied in his profession, was a clear abuse of discretion. 'Suspending judgment' or 'Placing . . . upon probation,' as permitted by Section 2372 of the code, would be a more appropriate discipline, and the case should be returned to the board for reconsideration of the penalty to be imposed."

Specifically in this case it was held that the administration of an anesthetic is an act which is "medical or surgical in character," and that it is unlawful for an unlicensed person even under supervision to do it. More broadly, the decision in this case appears to hold that acts which are "medical or surgical in character" or the practice of any system or mode of "treating the sick or afflicted" or acts which constitute diagnosis or treatment of any ailment may be done lawfully only by persons licensed to practice medicine or licensed to do specific things. Exactly what is included by these terms is a question of fact and common medical practice.

The licensing power of the State and the dignity of a license were burnished anew by this decision. Of perhaps equal importance is the warning to li-

censees that they cannot loosely stretch their mantle of license to include *unlicensed* persons with the elastic concept of supervision; it is unprofessional conduct and illegal to do so. All licensed persons would be well advised to review their habits and concepts concerning the use of unlicensed technicians, aides, nurses, etc., in the light of this decision. This is particularly true concerning those acts which are "medical or surgical in character" and which, by statute, only certain licensed persons are authorized to perform.

Professional liability insurance contracts specifically *exclude* coverage for injuries resulting from unlawful or criminal acts. Further, it is well to remember that when legislation is enacted for the protection of the public, violation of its provisions ordinarily constitute a breach of the duty of care required of reasonable and prudent men. Thus, the unlawful use of unlicensed personnel may subject a physician to:

(a) Loss of his professional liability insurance coverage;

(b) Imposition of almost absolute liability for injuries occurring from acts performed by such unlicensed persons, and

(c) Loss or limitation of his license to practice.

Because of all the circumstances in the Magit case, such as the fact that the question had not been previously answered by "code or by a decision of our courts," it was recommended that probation or suspension of judgment ought to be more appropriate than revocation of license. It would be prudent to assume that, a ruling having been made, the next person found to have aided and abetted unlicensed persons to practice medicine will have no claim upon judicial leniency.

Many physicians use unlicensed assistants whom they have trained to help them in obtaining facts to determine what treatment is needed and to assist administratively in giving treatment. Accepted custom and practice in the profession may be considered by the State Board of Medical Examiners and the courts in determining whether the acts done are an obvious integral part of medical or surgical treatment and constitute diagnosis and treatment of the sick or are ancillary functions and tasks that may be performed under the direction and supervision of a licensed physician by a well-trained assistant. Acts which are not an obvious integral part of medical and surgical treatment were not before the court in this case. The rule that applied to an anesthetic need not apply to the taking of a history, weighing a patient or determining body temperature and other clerical, ancillary or administrative functions in a physician's office which are performed by trained but unlicensed persons.

INFORMATION

Traffic Safety

Lapses of Consciousness Reportable as Epilepsy

The following statement from the California Medical Association Traffic Safety Committee is endorsed by the C.M.A. Council and the State Department of Public Health.

ALL CONDITIONS which subject patients to any lapse of consciousness, and which may become chronic or recurring, have been reportable since 1939 in California under the term *epilepsy*. This report should be made to the local public health officer. This information is recorded and passed through the State Health Department to the Department of Motor Vehicles which shall treat the report confidentially and use the report, along with all available medical data, in evaluating the eligibility of the individual to operate a motor vehicle on the public highways with safety to self and others.

The importance of this reporting by all physicians is being stressed by the C.M.A. Council and the Committee on Traffic Safety. The physician's responsibility does not stop with reporting the condition, and he has done his patient no disservice in complying with the law. The representatives of the Driver Improvement Program of the Department of Motor Vehicles will want to work with the physician in arriving at a decision in each case on an individual basis. This means that all medical facts pertinent to the condition need to be transmitted to the Driver Improvement Program in determining whether license should be granted or revoked (and for what time period—or under what condition reinstatement would be considered). Where lack of agreement on a course of action exists, it has been suggested that a committee of physicians impartially consider all medical data and give an opinion to the department. This plan is being followed presently in several California counties which have active Traffic Safety Committees.

In the interest of decreasing the staggering toll of traffic induced injuries and fatalities, all physicians are urged to report cases falling under this category, and to give other full cooperation to driver improvement analysts—thus serving both their patients and the public at large.

STATE REGULATIONS ON REPORTING OF EPILEPSY

1. California Health and Safety Code, 1959:
   Section 410. "The State Department of Public